No. 16-1432

In The
Supreme Court of the United States

ASHLEY SVEEN AND ANTONE SVEEN,

Petitioners,

v.

KAYE MELIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF PROFESSOR JAMES W. ELY, JR. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

DANA BERLINER
Counsel of Record
JEFFREY H. REDFERN
JAMES W. ELY, JR.
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
dberliner@ij.org

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
BRIEF OF PROFESSOR JAMES W. ELY, JR. AS *AMICUS CURIAE* SUPPORTING RESPONDENT	1
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
A. The Contract Clause was long one of the most important provisions of the Constitution	4
1. The vindication of contractual rights was of crucial importance to the Framers	4
2. The Contract Clause was designed to safeguard the stability of contractual arrangements and promote commerce	9
3. The Contract Clause was frequently litigated and vigorously enforced by the courts	10
B. Starting in the late nineteenth century, this Court began to create problematic exceptions to the Contract Clause which virtually eliminated it from the Constitution	15
C. This case presents an opportunity to correct this Court's Contract Clause jurisprudence	20

TABLE OF CONTENTS – Continued

Page

D. Even if this Court declines to revisit *Blaisdell* and subsequent decisions, the decision below should be affirmed..... 24

CONCLUSION..... 27

TABLE OF AUTHORITIES

Page

CASES

Allied Structural Steel Co. v. *Spannaus*, 438 U.S. 234 (1978) 19, 21

Block v. *Hirsh*, 256 U.S. 135 (1921) 16

Bronson v. *Kinzie*, 42 U.S. 311 (1843) 12

Champion and Dickason v. *Casey* (1792) 10

Charles River Bridge v. *Warren Bridge*, 36 U.S. 420 (1837) 12

City of El Paso v. *Simmons*, 379 U.S. 497 (1965) 16

Dartmouth Coll. v. *Woodard*, 17 U.S. 518 (1819) 11

Edwards v. *Kearsey*, 96 U.S. 595 (1877) 13

Energy Reserves Grp. v. *Kansas Power & Light Co.*, 459 U.S. 400 (1983) 20, 26

Fletcher v. *Peck*, 10 U.S. 87 (1810) 11, 24

Gen. Motors Corp. v. *Romein*, 503 U.S. 181 (1992) 21

Home Bldg. & Loan Ass'n v. *Blaisdell*, 290 U.S. 398 (1934) ..... *passim*

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987) 21, 26

Manigault v. *Springs*, 199 U.S. 473 (1905) 16

Marcus Brown Holding Co. v. *Feldman*, 256 U.S. 170 (1921) 16

Murray v. *Charleston*, 96 U.S. 432 (1877) 14

New Jersey v. *Wilson*, 11 U.S. 164 (1812) 11

Ogden v. *Saunders*, 25 U.S. 213 (1827) 10

TABLE OF AUTHORITIES – Continued

Page

Sturges v. *Crowninshield*, 17 U.S. 122 (1819)... 11, 22, 23

The Washington Univ. v. *Rouse*, 75 U.S. 439 (1869)....14

United States Trust Co. v. *New Jersey*, 431 U.S. 1 (1977)....18

Vanhorne's Lessee v. *Dorrance*, 2 U.S. 304 (Cir. Ct. Penn. 1795)....10

STATUTES

U.S. Const. art. I, § 8....6

U.S. Const. art. I, § 10....*passim*

OTHER AUTHORITIES

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989)....23

Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 179 (1913)....9

James W. Ely, Jr., *The Contract Clause: A Constitutional History* (University Press of Kansas 2016)....*passim*

James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 3d ed. 2008)....2, 6

Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1836)....8

TABLE OF AUTHORITIES – Continued

Page

The Federalist No. 7 (Alexander Hamilton).....8

The Federalist No. 44 (Alexander Hamilton).....8

The Federalist No. 84 (Alexander Hamilton).....7

Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135 6

BRIEF OF PROFESSOR JAMES W. ELY, JR. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

INTEREST OF THE *AMICUS CURIAE*[1]

James W. Ely, Jr., is the Milton R. Underwood Professor of Law, Emeritus, and Professor of History, Emeritus, at Vanderbilt University. His most recent book is *The Contract Clause: A Constitutional History* (University Press of Kansas 2016). The book traces the history of the Contract Clause from the Constitutional Convention (convened in part because of dissatisfaction with state-level efforts to abrogate existing contracts), through the first century of the Constitution (when the Clause was vigorously enforced by the courts), to the twentieth century (when this Court largely read the Clause out of the Constitution). The book constitutes the first comprehensive look at the Contract Clause since Benjamin F. Wright's 1938 classic, *The Contract Clause of the Constitution*. As the nation's chief living authority on the Contract Clause, Professor Ely has an interest in participating in the Court's first Contract Clause case in a generation.

---

[1] In accordance with Rule 37.6, *amicus* affirms that no counsel for a party authored this *amicus* brief in whole or in part and that no person other than *amicus* or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

Professor Ely is nationally renowned as a legal historian and as one of the leading experts in the field of property rights. He was awarded the Brigham-Kanner Property Rights Prize in 2006, and he has frequently lectured before the Supreme Court Historical Society. He has authored a number of other books, including *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford University Press, 3d ed. 2008), *American Legal History: Cases and Materials* (Oxford University Press, 5th ed. 2017) (with Kermit L. Hall and Paul Finkelman), *The Chief Justiceship of Melville W. Fuller, 1888-1910* (University of South Carolina Press 1995, paperback edition 2012), *The Fuller Court: Justices, Rulings, and Legacy* (ABC-CLIO 2003), and *Railroads and American Law* (University Press of Kansas 2001). This Court recently cited the latter work in *Marvin M. Brandt Revocable Trust* v. *United States*, 134 S. Ct. 1257 (2014). He has also written numerous articles dealing with the history of property rights. He served as assistant editor of the American Journal of Legal History from 1987 to 1999.

SUMMARY OF ARGUMENT

The question in this case is whether a state legislature can, consistent with the Contract Clause, retroactively rewrite existing life insurance policies so that, upon the policyholder's divorce, his or her ex-spouse is automatically un-designated as the beneficiary. Under the Contract Clause as originally understood, and as

faithfully applied by this Court for over a century, the answer to this question is easy: No. And even under this Court's more lenient, modern jurisprudence, the statute at issue is a bridge too far.

The Contract Clause is one of the few specific restrictions on the power of state governments that was written into the original Constitution. The post-independence period in America was a time of serious economic and financial distress. Desperate people began to turn to state legislatures for debt relief measures. Much of the legislation that was enacted during this period, however, had the effect of undermining credit markets and commerce. The Framers drafted the Contract Clause because they saw the evils of legislative interference with existing contracts.

From ratification through the nineteenth century, the Contract Clause was by far the most important and frequently litigated federal restraint on the power of state governments. Much of the litigation during that period concerned whether a contract existed or whether altering a contractual remedy impaired the obligation of a contract. There was never any question, however, that contracts were to be held inviolate.

That changed in the twentieth century, when this Court began to hold that the Contract Clause prohibits only "unreasonable" interference with existing contracts. This Court now applies a flexible, three-factor test to determine when the Contract Clause is violated. As a result, the Clause has largely faded to insignificance.

This Court should take this opportunity to reject the current three-factor test and return to the original understanding of the Contract Clause. Under such an approach, there is no question that Respondent must prevail. Yet, even if the Court is not inclined to fundamentally reevaluate its Contract Clause jurisprudence, Respondent must still prevail because it is not possible to rule for Petitioners without reinventing the three-factor test as a hyper-deferential, state-always-wins charade. Such a ruling would truly mean the end of the Contract Clause.

ARGUMENT

A. The Contract Clause was long one of the most important provisions of the Constitution.

This case presents the Court with an opportunity to reconsider its Contract Clause jurisprudence and to articulate a more searching standard of review that will reinvigorate the provision as a safeguard against state legislation that rewrites existing contracts.

1. The vindication of contractual rights was of crucial importance to the Framers.

The high standing accorded contractual rights by the Framers is expressed in Article I, section 10, of the Constitution, which provides: "No state shall * * * pass

any * * * Law impairing the Obligation of Contracts."[2] Drawn from similar language in the Northwest Ordinance of 1787, the Contract Clause was adopted in response to the bitter experience of state interference with contractual arrangements during the post-Revolutionary Era. State lawmakers enacted a wide variety of debt-relief laws and revoked the corporate charter of the Bank of North America.

In fact, one of the major reasons for the Philadelphia Convention was that this legislative tampering with existing agreements had aroused intense criticism and fueled the conviction that the rights of

---

[2] The complete Section 10 provides:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.
>
> No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul [sic] of the Congress.
>
> No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

property owners and contracting parties would be better protected under a new constitutional order replacing the Articles of Confederation. James W. Ely, Jr., *The Contract Clause: A Constitutional History* 7–12 (2016). "Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights." Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wis. L. Rev. 1135, 1136; see also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 42–58 (3d ed. 2008) (detailing the high value assigned to property rights by the Framers).

Feeling that the state governments could not be trusted to respect economic rights, the Framers sought in Article 1, section 10 to restrict state authority in several respects. Foremost among these limitations on state power was the Contract Clause.[3] As Justice Hugo L. Black pointed out, the Contract Clause was "one of the few provisions [explicitly limiting states' powers] which the Framers deemed of sufficient importance to place in the original Constitution." *City of El Paso* v. *Simmons*, 379 U.S. 497, 591 (1965) (Black, J., dissenting). It bears emphasis that the Framers thought a ban on state impairment of existing contracts was so vital

[3] By its express terms the Clause was binding only on the states and did not restrict congressional authority over contracts. In fact, the Bankruptcy Clause, by authorizing Congress to enact "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, § 8, provided Congress with explicit authority to abrogate contracts.

as to include it in the Constitution at the same time they were insisting that a bill of rights was unnecessary. See *The Federalist* No. 84 (Alexander Hamilton).

It is also significant that the Contract Clause was framed during a period of severe economic hardship. As Justice George Sutherland explained:

> Following the Revolution, and prior to the adoption of the Constitution, the American people found themselves in a greatly impoverished condition. Their commerce had been well-nigh annihilated. They were not only without luxuries, but in great degree were destitute of the ordinary comforts and necessities of life. * * * The circulation of depreciated currency became common.

Home Bldg. & Loan Ass'n v. *Blaisdell*, 290 U.S. 398, 454–455 (1934) (Sutherland, J., dissenting). It was the judgement of the Framers that security of contracts was essential, *especially* in troubled times, for it was primarily in such times that people began to seek "legislative interference" with their contractual obligations. *Id.* at 455. This interference caused credit markets to collapse, such that "[b]onds of men whose ability to pay their debts was unquestionable could not be negotiated except at a discount of 30, 40, or 50 per cent." *Ibid.*

During the debates over ratification of the Constitution, prominent members of the Convention extolled the significance of the Contract Clause as essential for preserving credit and encouraging commerce.

Alexander Hamilton, for example, argued that legislative interference with contracts would be a "probable source of hostility" between the states, encouraging retaliation and undercutting the goal of a commercially unified republic. *The Federalist* No. 7. And Charles Pinckney characterized Article I, section 10 as "the soul of the Constitution," insisting: "Henceforth, the citizens of the states may trade with each other without fear of tender-laws or laws impairing the nature of contracts." 4 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 333–336 (1836).

Aside from considerations of economic utility, the Contract Clause was justified in terms of beneficial social consequences. James Madison, for example, defended the Contract Clause in terms of fairness. Writing in *The Federalist*, he proclaimed that laws abridging contracts were "contrary to the first principles of the social compact, and to every principle of sound legislation," and characterized the Contract Clause as a "constitutional bulwark in favor of personal security and private rights." *The Federalist* No. 44 (James Madison).

Even some critics of the proposed constitution, known as Anti-Federalists, admitted the need for a ban on contractual impairments by the states. One acknowledged that the states had often acted irresponsibly regarding debtor-creditor relations. Another Anti-Federalist offered a proposal: "It shall be left to every state to make and execute its own laws, except

laws impairing contracts, which shall not be made at all." Ely, *The Contract Clause* 17.

2. The Contract Clause was designed to safeguard the stability of contractual arrangements and promote commerce.

The Contract Clause was grounded on the premise that honoring contractual arrangements served the public interest by encouraging commerce. As Charles A. Beard observed: "Contracts are to be safe, and whoever engages in a financial operation, public or private, may know that state legislatures cannot destroy overnight the rules by which the game is played." Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 179 (1913). Stability of agreements was crucial in a growing market economy. As Roger Sherman and Oliver Ellsworth, Connecticut delegates to the Constitutional Convention, explained, the Convention believed the Contract Clause was "necessary as a security to commerce, in which the interests of foreigners, as well as the citizens of other states, may be affected." Ely, *The Contract Clause* 14.

Likewise, John Marshall understood the adoption of the Contract Clause to be a response to deleterious state abuses which threatened commerce and credit. In 1827 Marshall linked the Clause with a desire to foster commercial transactions:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every

> man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as to not only impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith.

Ogden v. *Saunders*, 25 U.S. 213, 354–355 (1827) (Marshall, J., dissenting).

3. The Contract Clause was frequently litigated and vigorously enforced by the courts.

During the 1790s there were harbingers of the key role that the Contract Clause would play throughout much of our history. The Clause figured prominently in early federal court decisions. In fact, the first federal court decision invalidating a state law was grounded on the Contract Clause. In *Champion and Dickason* v. *Casey* (1792), the U.S. Circuit Court, including Chief Justice John Jay, struck down a Rhode Island debt-relief measure. See Ely, *The Contract Clause* 22–27; *Vanhorne's Lessee* v. *Dorrance*, 2 U.S. 304 (Cir. Ct. Penn. 1795) (Paterson, J.) (treating land grant as a contract which state could not later abrogate).

Moreover, many states included a Contract Clause based on the federal model as they either revised or adopted their constitutions. This development signaled broad acceptance of the constitutional norm protecting agreements from state interference. Thus, the potential for a full and natural reading of the Contract Clause was established well before this Court first addressed the question in 1810.

As is well known, Chief Justice John Marshall recognized that the Contract Clause was intended to be a secure base for the protection of both private and public contracts against retroactive state infringement. Indeed, the Contract Clause was the centerpiece of Marshall Court jurisprudence. This was exemplified by a series of landmark cases: *Fletcher* v. *Peck*, 10 U.S. 87 (1810) (state land grant was a contract within the purview of the Contract Clause, and an attempt to rescind the grant violated the Constitution); *New Jersey* v. *Wilson*, 11 U.S. 164 (1812) (state grant of tax immunity was a protected contract); *Dartmouth College* v. *Woodard*, 17 U.S. 518 (1819) (corporate charter was a constitutionally protected contract); *Sturges* v. *Crowninshield*, 17 U.S. 122 (1819) (state statute purporting to discharge prior debts was invalid under Contract Clause).

In these cases, Marshall established two cardinal principles – that the Contract Clause embraced both contracts by states and agreements between private parties, and that the reach of the Contract Clause was not confined to those controversies existing at the time of the framing. Indeed, he broadly observed: "The

convention appears to have intended to establish a great principle, that contracts should be inviolate." So high was Marshall's regard for the Contract Clause that he characterized Article I, section 10 as a "bill of rights for the people of each state." Ely, *The Contract Clause*, 30–58.

In the antebellum years after Marshall left the bench, the Court continued to vigorously enforce the Clause. For example, in the leading case of *Bronson* v. *Kinzie*, 42 U.S. 311 (1843), the Court invalidated Illinois debt relief measures which altered the remedies available to a mortgagee to foreclose on property in default. The Court pointed out that these laws imposed new and onerous conditions on the mortgagee. More importantly, the Court endorsed the purpose behind adoption of the Contract Clause in sweeping language:

> It was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful execution throughout this Union by placing them under the protection of the Constitution of the United States.

Id. at 318. *Bronson* guided subsequent decisions regarding debt-relief laws until the 1930s.

Although the Court ruled in the famous case of *Charles River Bridge* v. *Warren Bridge*, 36 U.S. 420 (1837) that corporate charters should be strictly construed to bar claims of implied privilege, the Court never questioned the fundamental premise that state-granted charters were contracts within the purview of

the Constitution. The Court, for instance, invalidated state laws regulating banks as violative of the Contract Clause. Even more significant was a line of decisions upholding tax exemptions contained in charters as protected by the provision. See Ely, *The Contract Clause* 81–86.

The same pattern of robust enforcement continued into the postbellum decades. In the aftermath of the Civil War many southern states, facing widespread devastation, enlarged the amount of homestead exemptions from the reach of creditors and sought to apply the increased exemptions retroactively to antecedent debts. This Court firmly insisted that such laws, as applied to prior obligations, ran afoul of the Contract Clause. Justice Noah Swayne explained: "No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice." *Edwards* v. *Kearzey*, 96 U.S. 595, 603 (1877). In reaching this conclusion the Court not only implicitly rejected financial hardship as a justification for abridging agreements, but also stressed the significance of contractual stability for society at large.

In the late nineteenth century the Court invoked the Contract Clause to uphold tax exemptions, to bar legislative schemes to repudiate municipal debts, and to prevent lawmakers from changing foreclosure procedures for preexisting mortgages. Ely, *The Contract Clause*, 135–141, 150–151, 167–171, 177–184. Prominent jurists celebrated the importance of the provision.

Justice William Strong, speaking for the Court in *Murray* v. *Charleston*, proclaimed:

> There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away.

96 U.S. 432, 448 (1877).

Even jurists who sometimes disputed the applicability of the Contract Clause in particular cases nonetheless went out of their way to express their respect for the provision. Justice Samuel F. Miller expressed this attitude in his dissent in *The Washington University* v. *Rouse*:

> We are also free to admit that one of the most beneficial provisions of the Federal Constitution, intended to secure private rights, is the one which protects contracts from the invasion of State legislation. And that the manner in which this court has sustained the contracts of individuals has done much to restrain the State legislatures, when urged by the pressure of popular discontent under the sufferings of great financial disturbances, from unwise, as well as unjust legislation.

75 U.S. 439, 442 (1869) (Miller, J., dissenting).

Throughout the first hundred years of the Contract Clause, this Court's dedication to the inviolability

of contracts was unwavering. The only difficult questions concerned whether certain kinds of legislative enactments could be regarded as contracts and whether modifying breach-of-contract remedies constituted an impermissible impairment.

B. Starting in the late nineteenth century, this Court began to create problematic exceptions to the Contract Clause which virtually eliminated it from the Constitution.

By creating a number of exceptions to the Contract Clause, this Court not only moved away from the original understanding of the Clause but also undermined its efficacy. Foremost among these exceptions was the affirmation of an unalienable police power, which states could not bargain away by entering into contracts with private parties.

Although the police power is not mentioned in the Constitution, no one doubts its existence. Initially the police power was understood to encompass measures that directly advanced the public health, safety, or morals. Over time, however, courts expanded the police power far beyond its original scope, to encompass any measures that arguably advanced an open-ended conception of public welfare. Courts generally held that legislatures could not bargain away the police power by entering contracts, and they even began to hold that agreements between private parties contained implied terms recognizing the state's police power. As the scope of the police power grew, it had the potential to

override both private and public contracts, swallowing the Contract Clause. Ely, *The Contract Clause* 160–167.

The emergence of a boundless police power was compounded by heavy judicial deference to legislative determinations of the public welfare. See *Manigault* v. *Springs*, 199 U.S. 473, 480–481 (1905) (holding that the police power "is paramount to any rights under contracts between individuals," and noting that "there is wide discretion on the part of the legislature in determining what is and what is not necessary, – a discretion that courts ordinarily will not interfere with"). In short, this Court came close to saying that state lawmakers, notwithstanding the seemingly absolute language of the Contract Clause, could impair contracts whenever they could come up with a reason for doing so.

This ability of legislators to rely on assertions of the police power to circumvent the Contract Clause was reinforced by judicial acceptance of the emergency character of legislation as a justification to abridge contracts. This was illustrated by the rent control cases arising from World War I. This Court upheld the imposition of rent control on existing leases as a response to emergency housing conditions, brushing aside the contention that an emergency did not empower lawmakers to nullify leases. See *Block* v. *Hirsh*, 256 U.S. 135 (1921); *Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921). Justice Joseph McKenna, in dissent, perceptively asked whether other provisions of the Constitution might also be subordinated to the police power. *Block*, 256 U.S. at 170.

These developments culminated in the unfortunate decision in *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934). There this Court, sharply divided, upheld a state moratorium on the foreclosure of mortgages during the Great Depression. This was the type of legislation routinely invalidated during the nineteenth century as a violation of the Contract Clause. Chief Justice Charles Evans Hughes, speaking for the Court, took this occasion to reformulate the principles governing Contract Clause cases. He enigmatically declared: "While emergency does not create power, emergency may furnish the occasion for the exercise of power." *Id.* at 426. Hughes maintained that the prohibition of the Contract Clause "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Id.* at 428. He further insisted that the Clause "must [not] be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them." *Id.* at 443.

In short, Justice Hughes cut the Contract Clause loose from both the constitutional text and the views of the framers. Arguing that the economic interests of a state might justify interference with contracts, Hughes declared that infringement of contracts would pass constitutional muster if "the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.* at 438. This converted the determination of Contract Clause violations into an uncertain balancing test. Writing for the dissenters, Justice George Sutherland maintained that

economic distress did not provide a basis for ignoring the Contract Clause and warned that *Blaisdell* opened the door to further encroachments upon the sanctity of contracts. Ely, *The Contract Clause* 220–226.

As Sutherland feared, *Blaisdell* delivered a near-fatal blow to the Contract Clause. This Court in effect gutted the provision as a guarantee of agreements, and relegated it to the periphery of constitutional law. Review of contract cases became perfunctory. After 1941 this Court did not overturn any state law on Contract Clause grounds for 35 years. Indeed, the Clause virtually disappeared from this Court's docket for decades. Little wonder that courts and commentators largely ignored this seemingly moribund provision.

In a pair of decisions in the mid-1970s, however, this Court recalled the Contract Clause from hibernation. First, in *United States Trust Company* v. *New Jersey*, this Court struck down a New Jersey statute that, the Court found, had purported to abrogate an agreement to which the state itself was a party. 431 U.S. 1 (1977). The Court's decision was premised primarily on the potential for abuse when a state could excuse itself from its own "purely financial" obligations. *Id.* at 25. Notwithstanding the narrow grounds for the decision, the Court still found it necessary to deny that "the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory." *Id.* at 16.

One year later, this Court issued its last opinion invalidating a statute on Contract Clause grounds.

Allied Structural Steel Company v. *Spannaus* concerned a Minnesota statute requiring, essentially, that when a business closes an office in Minnesota it must provide pension benefits to employees who had worked at the office for ten or more years, regardless of whether their benefits had vested under the terms of the pension plan. 438 U.S. 234, 241 (1978). It would be difficult to imagine a more quintessential attempt to rewrite an existing contract to favor one class of people at the expense of another. Nevertheless, in striking the statute down, Justice Potter Stewart, writing for the Court, still saw the need to affirm that the Clause "remains part of the Constitution. It is not a dead letter." *Spannaus*, 438 U.S. at 241. Such defensive language, particularly in such an egregious case, speaks volumes about the diminished standing of the Contract Clause in this Court's jurisprudence.

Unfortunately, these declarations about the continuing vitality of the Contract Clause were not matched by meaningful actions. The decisions themselves were narrow and confusingly reasoned, and the Court soon abandoned any attempt to reinvigorate the Clause. Instead, this Court formulated an ambiguous multipronged test, heavily weighted in favor of state authority, that fell woefully short of providing a principled basis on which to restore the Clause to its historic role as a safeguard of existing contracts. Ely, *The Contract Clause*, 241–247. The Court's current Contract Clause test asks:

1) whether a law causes a "substantial impairment" of contract rights;

2) if so, whether the law serves a "significant and legitimate public purpose," such as "the remedying of a broad and general social or economic problem";

3) and, finally, whether the means of serving that purpose are "reasonable" and "appropriate." In determining reasonableness, the Court stressed heavy deferenceto legislative justifications.

Energy Reserves Grp. v. *Kansas Power & Light Co.*, 459 U.S. 400, 412–413 (1983). This modern formulation of the Contract Clause has little in common with the Clause that the Framers drafted, that the states ratified, and that this Court faithfully enforced for the first century of this Nation's history. Instead, it appears an effort substitute a radically different understanding of the protection of contracts for that expressed in the Constitution.

C. This case presents an opportunity to correct this Court's Contract Clause jurisprudence.

This Court's current balancing test for Contract Clause violations cannot be squared with either the original understanding of the Clause or its purpose. Indeed, in *Blaisdell*, Justice Hughes blithely admitted that he was not interested in what the Contract Clause meant at the time of ratification. 290 U.S. at 442 ("It is no answer to say that this public need was not

apprehended a century ago, or to insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."). Instead, he insisted that "growing recognition of public needs and the relation of the individual right to public security" justified reading the Clause narrowly. *Id.* at 443–444.

Later decisions of this Court have further weakened the balancing approach in *Blaisdell* – most significantly by removing the qualification that contracts be abrogated only for emergencies and only for limited time periods. See *Spannaus*, 438 U.S. at 249 n.24. This Court's most recent decisions have largely followed *Blaisdell*'s anti-originalist reasoning. See *Gen. Motors Corp.* v. *Romein*, 503 U.S. 181, 186, (1992) ("Article I, § 10, of the Constitution provides: 'No State shall . . . pass any . . . Law impairing the Obligation of Contracts.' * * * Generally, we first ask whether the change in state law has 'operated as a substantial impairment of a contractual relationship.' "); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 502 (1987) ("[I]t is well settled that the prohibition against impairing the obligation of contracts is not to be read literally."). If anything, this Court has strayed even further from the Framers' intent.

The current, three-factor test asks whether a statute creates a "substantial" and "unreasonable" interference with contract rights and, essentially, whether the legislature seemed to have any reason, however contrived, for abrogating contracts. This test would have astonished John Marshall, who had found that

the words of the Contract Clause "are express, and incapable of being misunderstood." *Sturges* v. *Crowninshield*, 17 U.S. 122, 198 (1819). He explained that "the inviolability of contracts * * * was to be protected in whatsoever form it might be assailed." *Id.* at 200. There was no reason, he wrote, for the Framers to "enumerate the particular modes of violation which should be forbidden, when it was intended to forbid all[.]" *Ibid.*

Yet, since *Blaisdell*, this Court has rejected this original understanding and plain meaning of the Contract Clause. It has done so, not through any process that could be called interpretation – for, as Marshall said, the Clause could hardly be any clearer – but because the Court concluded that the Clause was inconsistent with the "growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare." *Blaisdell*, 290 U.S. at 442.

This Court's re-writing of the Contract Clause in *Blaisdell* was especially misguided because it was based on a false premise – that the Great Depression constituted an "economic emergency" and that the legislature's "need" to "reasonabl[y]" abrogate contracts could not have been foreseen by the Framers. Yet as discussed above, nothing could be further from the truth. The major impetus for the Constitutional Convention was, in fact, the economic emergency of the post-Revolution years. See *Blaisdell*, 290 U.S. at 454, 467. Against this backdrop, states passed a variety of debtor relief laws, and it was precisely these kinds of measures that were the most immediate target of the

Contract Clause. And for over 100 years, this Court faithfully applied the Contract Clause throughout periods of economic turmoil and distress.

So even if "changed circumstances" were a legitimate justification for abandoning the original meaning of the Constitution, there were, in fact, no changed circumstances in the early twentieth century. If the Framers had been alive in 1934, they would doubtless have been surprised at many things, but one thing that would not have surprised them in the least would have been an economic downturn, accompanied by legislative efforts to rewrite contracts.

Another reason that this Court should return to its pre-*Blaisdell* interpretation of the Contract Clause is that the current test is hopelessly indeterminate, providing very little guidance to courts and litigants. Instead of a complete and unambiguous prohibition, the Court has now held that the Contract Clause bars only "substantial" and "unreasonable" interference with contract rights. This flexible inquiry introduces the very ad hoc "perplexity" that Justice Marshall said the Clause was intended to avoid. *Sturges*, 17 U.S. at 200.

The shortcomings of flexible, multi-pronged tests are well known, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1182 (1989), and the criticisms apply with full force here. Yet it is sadly ironic that the Court has fashioned such an amorphous test for the Contract Clause – the one constitutional provision that, more than any other, was

designed to ensure stability and predictability in commercial relationships.

The Court should return to its pre-*Blaisdell* jurisprudence and hold, like John Marshall, that contracts are "inviolable," and that it is irrelevant whether a legislature's attempt to abrogate a contract is "reasonable," whether the abrogation is "substantial," and whether the abrogation is for a good reason. Under the Contract Clause as originally understood, and as applied by this Court for over 100 years, there can be no doubt that Minnesota's statute impermissibly impairs the obligations of contract.[4]

D. Even if this Court declines to revisit *Blaisdell* and subsequent decisions, the decision below should be affirmed.

The current, three-factor balancing test has many faults, but it is not (yet) completely toothless. And as Respondent demonstrates, Br. 33–60, the Minnesota statute at issue fails all three prongs. One point, however, merits particular emphasis: The governmental interest that this statute supposedly serves is astonishingly slight.

---

[4] Petitioners argue that the Contract Clause should not be construed to reach this contract because the Framers' primary concern was with retroactively altering debtor-creditor relations. Pet. Br. at 61–63. The entire history of the Contract Clause refutes this contention. As John Marshall recognized, the words of the Contract Clause "are general and are applicable to contracts of every description." *Fletcher* v. *Peck*, 10 U.S. 87, 137 (1810).

As Petitioners repeatedly emphasize, the Minnesota statute does not prevent policyholders from changing their designated beneficiaries after they are divorced. The statute's only purpose, therefore, is to protect some subset of divorced individuals who would not want their ex-spouses to be the beneficiaries of their policies but who forgot or could not be bothered to change the designation on their policies. The interests of this subset of individuals is prioritized against the interests of another group: policyholders who want to retain their ex-spouses as beneficiaries but who are unaware that the law has subsequently changed. Petitioners argue that "the legislature made the empirical determination that" the latter group is smaller than the former. Br. at 57. But that claim is totally unsupported. Although the question is certainly susceptible of empirical analysis, there is no indication that the legislature – or, more accurately, the National Conference of Commissioners on Uniform State Laws that drafted the model rule – ever made an empirical determination.

Moreover, there is serious reason to doubt that the average divorcing policyholder would no longer wish for his or her ex-spouse to be the beneficiary of the policy. The primary purpose of life insurance is to provide financial security to families, and especially dependent children, in the event that a breadwinner dies unexpectedly. The need for such security does not disappear because of divorce.

At bottom, Petitioners' argument implies that evidence is unnecessary and that even an implausible hypothetical rationale is sufficient to demonstrate a "public purpose" that justifies rewriting existing contracts. There is nothing in this Court's precedents supporting such a meaningless standard of review. To the contrary, the cases repeatedly emphasize that there must be a "significant and legitimate public purpose behind the regulation." *Energy Reserves Grp.* v. *Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983); *accord Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 505 (1987) (holding that preventing obvious environmental harm is a "significant and legitimate public purpose").

In order to rule for Petitioners here, this Court would have to hold that courts have no business enquiring whether the legislature is advancing a genuine public purpose when it enacts legislation that directly alters the core subject matter of preexisting contracts. Such a ruling would go beyond anything this Court has done before, and it would signify the final nail in the Contract Clause's coffin. Even if the Court declines to revisit *Blaisdell* in this case, at the very least, it should hold the line.

CONCLUSION

The judgment of the Eighth Circuit should be affirmed.

Respectfully submitted.

DANA BERLINER
Counsel of Record
JEFFREY H. REDFERN
JAMES W. ELY, JR.
INSTITUTE FOR JUSTICE
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
dberliner@ij.org

Counsel for Amicus Curiae

FEBRUARY 2018